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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

EMMA SHANNON AND RICHARD J. SHANNON, D/B/A E. AND B. SHANNON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS—SAN ANTONIO DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is not yet reported. The opinion, together with the court's judgment, is reproduced in Appendix I, *infra*, pp. 1a–6a. The report of the Interstate Commerce Commission is reported at 81 M.C.C. 337, and, together with its orders, is reproduced in Appendix II, *infra*, pp. 7a–34a.[1]

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284 and 2321–2325 to set aside orders of the Inter-

[1] The report and orders were consolidated with those in Docket No. MC–C–1994, *Fraering Brokerage Co., Inc. Investigation of Operations*, not involved here.

state Commerce Commission. The judgment of the district court, *infra*, pp. 5a–6a, was entered May 1, 1963, and on July 1, 1963, the United States of America and the Interstate Commerce Commission filed their notice of appeal. The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *United States v. Drum*, 368 U.S. 370.

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.*, are set forth in Appendix III, *infra*, pp. 35a–37a.

QUESTION PRESENTED

Whether the district court applied the wrong standard for determining, under Section 203(c) of the Interstate Commerce Act, whether motor transportation is "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of a carrier and thus is private rather than for-hire transportation.

STATEMENT

This case grows out of a proceeding instituted by the Interstate Commerce Commission to determine whether the appellees' motor transportation of sugar constituted carriage for-hire rather than private carriage, and therefore was illegal because performed without operating authority from the Commission.

1. The appellees, a partnership, are engaged in the business of buying and selling livestock and other goods. Their business headquarters and a warehouse

are in San Antonio, Texas. The business includes dealing in fertilizer, feed-grains, molasses and salt—and since 1954, in sugar. On shipments of livestock and other related items—but not sugar—the appellees have used common carriage to some extent. They also operate seven trucks; and it is conceded that in transporting items other than sugar the appellees are acting in furtherance of their principal business enterprise and are engaged in lawful private carriage (App. II, *infra*, p. 14a).

The appellees' dealings in sugar, begun in 1954, were developed to provide return cargo for their trucks which have made deliveries of livestock or other merchandise to customers at or near the site of a sugar refinery at Supreme, Louisiana, about 525 miles from San Antonio. The sugar is bought when one of their trucks which has made such a delivery would otherwise return empty to San Antonio. Usually, the sugar is sold by the appellees while it is in transit from the refinery or within a day or two of the date on which it is picked up. Most of the sugar is handled in truckload lots and is sold and delivered directly to ultimate consumers in the San Antonio area, without processing or warehousing by the appellees. Approximately half a truckload of sugar is kept on hand and sold from the warehouse in small lots of from 1 to 25 bags. The appellees maintain their warehouse primarily for the processing or storage of grains, feeds or fertilizers. (App. II, *infra*, pp. 14a–16a.)

Appellees make a gross average profit of about 35 cents per hundred pounds on each truckload of sugar

they handle. The respective rail and truck rates for transportation of sugar between the same points are 69 cents and $1.00. (App. II, *infra*, pp. 15a–16a.)

2. The Commission held that the appellees' transportation of sugar constituted for-hire rather than private carriage and ordered them to cease and desist therefrom unless and until they obtained appropriate operating authority. It pointed out (App. II, *infra*, p. 16a) that under Section 203(c) of the Interstate Commerce Act the touchstone for determining whether transportation conducted by someone whose primary business is not transportation is "whether the operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed." Noting that the appellees "admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (*id.* at 21a),[2] the Commission stated (*id.* at 22a–23a):

> * * * We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such re-

[2] The Commission noted that where sugar transportation was not coordinated with backhauls, the transportation was to fill an especially profitable order obtained in advance (App. II, *infra*, p. 15a).

duction of the cost of transportation of the other commodities constitutes a profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

3. The district court set aside the order on the ground that the finding that the appellees had engaged in for-hire carriage was not supported by substantial evidence. The court stated (App. I, *infra*, pp. 3a–4a) that the appellees were engaged in the business of buying and selling goods; that most of their assets and weekly payroll were devoted to nontransportation operations; that they took title to the

sugar, bore the risk of loss, made sales on credit and maintained an inventory; that they did not hold themselves out to the general public as for-hire carriers; and that there were no identifiable transportation charges to purchasers of sugar. The court did not refer to Section 203(c), and did not discuss the facts upon which the Commission based its determination that the appellees' backhaul transportation of sugar was not within the scope and in furtherance of a primary business enterprise other than transportation.

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question concerning the criteria under Section 203(c) of the Interstate Commerce Act for determining when motor transportation constitutes private rather than for-hire carriage. In recent amendments to the Act, Congress has defined and limited the permissible scope of private motor carriage which may be undertaken without Commission operating authority. Section 203(c), which was added to the Act in 1957, prohibited engaging in "for-hire transportation" without such authority.[3] In the Transportation Act of 1958, 72 Stat. 574,

[3] Section 203(c), as added by Section 2 of Public Law 85-163, 71 Stat. 411, provided as follows:

"Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or

Section 203(c) was amended to add a prohibition on any person "engaged in any other business enterprise" from transporting property "by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance of a primary business enterprise (other than transportation) of such person" (App. III, *infra*, p. 36a).

1. The purpose of the 1958 amendment was to eliminate what Congress regarded as "pseudo-private carriage," characterized by "subterfuges" to evade economic regulation and avoid imposition of the transportation excise taxes. H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17–18; S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 5, 23. The Senate Committee (*id.* 24) explained that one common technique was the "so-called buy-and-sell method," in which papers are prepared "to make it appear" that the commodities belong to the owner of the vehicle; and that another increasingly-used device was "the backhaul method of operation" involved in this case. By this means—

> * * * concerns that deliver in their own trucks articles which they manufacture or sell * * * then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or * * * they transport property they do not own, such transportation being performed only

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a permit issued by the Commission authorizing such transportation." See S. Rep. 703, 85th Cong., 1st Sess., pp. 6, 7–8 (1957); H. Rep. 970, 85th Cong., 1st Sess., pp. 4, 9 (1957).

> for the purpose of receiving compensation for the otherwise empty return of their trucks.[4]

The 1958 amendment was intended to prohibit both of these disguised methods of for-hire transportation—backhaul buy-sell operations auxiliary to lawful private carriage and spurious buy-sell arrangements. As the Senate Committee explained (S. Rep. No. 1647 at pp. 24–25):

> With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, ex-

[4] Similarly, the House report (H. Rep. 1922, 85th Cong., 2d Sess., pp. 17–18) identified two types of "pseudo-private carriage" which it sought to prohibit as being "a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act." The first was the fictitious buy-sell arrangement. The second was the backhaul buy-sell here involved, described as follows (*id.* 18):

"In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost."

> cept as specifically provided, would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the 'primary business test' contained in *Brooks Transportation Co.* v. *U.S.* (340 U.S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

In the *Brooks Transportation* case, two chair manufacturers transported their products in their own trucks, and wherever possible used such vehicles on the return movement to haul manufacturing materials for their own use. The Commission held that the delivery of goods, and the backhaul, were lawful private carriage because undertaken "in bona fide furtherance of the primary business" of manufacturing chairs and not "conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed." *Lenoir Chair Co. Contract Carrier Application,* 51 M.C.C. 65, affirmed, *Brooks Transportation Co.* v. *United States,* 93 F. Supp. 517, 522 (E.D. Va.), affirmed, 340 U.S. 925. See also, H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 18–19.

In sum, the 1958 amendment made it clear that transportation performed by someone primarily engaged in a non-transportation business is for-hire carriage unless it is within the scope and in further-

ance of the "primary [non-transportation] business" and that the sale of goods engaged in solely to take advantage of a backhaul cannot qualify as such a primary business. In other terms, the inquiry is whether the transportation is undertaken to profit therefrom or to further a nontransportation enterprise.

2. The district court, without considering whether the Commission properly applied the primary business test in this case, set aside the Commission's finding that appellees' transportation of sugar constituted for-hire carriage as not supported by substantial evidence. Although this ruling purportedly rests on the sufficiency of the evidence, it in fact constitutes a rejection of the primary business test which Congress wrote into the statute in the 1958 amendment.

The determination whether the appellees' transportation of sugar was private or for-hire carriage does not depend, as the district court believed, upon such factors as whether they held themselves out to provide transportation service, whether they had an extensive investment in transportation equipment and facilities, whether they dealt in other goods, and whether they took title to and assumed certain risks in connection with the sugar. These facts would be pertinent if the appellees' bona fide ownership of the sugar had been challenged. Here, however, the question whether the transportation was incident to and in furtherance of the appellees' "primary business of buying and selling livestock and certain other commodities" (App. II, *infra*, p. 23a) must be answered in the light of the intent of Congress in Section 203(c) to prevent the use of the "backhaul method of operation"

as a means of escaping economic regulations (see *supra*, p. 7). Appellees admitted that "their principal reason for purchasing sugar at Supreme is to provide a back-haul * * * and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (App. II, *infra*, p. 21a). In view of this admission and the other evidence in the record respecting the appellees' sugar operations (see the Statement, *supra*, pp. 3–5), the Commission was fully warranted in concluding that their purpose in buying and transporting the sugar "is to reduce the cost of transporting other commodities outbound from San Antonio," and that such reduction in the cost of transporting the other commodities "constitutes a profit from the transportation of sugar * * * [which] is undertaken for the purpose of profiting from the transportation as such" (App. II, *infra*, p. 22a). The Commission thus correctly held that appellees were engaging in for-hire transportation in their sugar operations.

In *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508 (W.D. La.), another district court recently upheld a Commission finding that similar back-haul transportation of sugar, designed "to provide a revenue-producing northbound movement in connection with a southbound movement of merchandise for the plaintiffs' wholesaling operations [its primary business]" (200 F. Supp. at 512), constituted for-hire rather than private carriage. The court, after discussing the primary business test of Section 203(c), concluded (p. 517) that "this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private car-

riage by the Act. * * * Plaintiffs' justification of their northbound transportation would make a nullity of the primary business test expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible more profitable utilization of the equipment used in the primary business enterprise." See also, *Cahaba Steel Co.* v. *United States,* S.D. Ala., Civil Action No. 2669, decided January 17, 1962, where the court *per curiam* affirmed a Commission ruling that a wholesaler engaged in for-hire transportation by conducting a like back-haul operation. The wholesaler, after delivering his goods in his own trucks, "to avoid an empty return haul," purchased other goods, hauled them back to his point of origin, and there sold them; the evidence in that case, as in the present case, "show[ed] an intention to profit from the return transportation as such * * *". (*Cahaba Steel Co.—Investigation of Operations,* 86 M.C.C. 759, 764–765).

3. The question of the criteria under Section 203(c) for distinguishing between private and for-hire carriage is important in the administration of the Interstate Commerce Act and the regulation of the transportation industry. Unregulated motor carrier op-

erations are very substantial.[5] As this Court pointed out in *United States* v. *Drum*, 368 U.S. 370, 375, the requirement of Commission operating authority before a new motor carriage service may be commenced "bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market." As *Drum* further noted, this same concern underlies the statutory provisions limiting and defining the scope of exempt private carriage. The use of buy-sell arrangements for evasion or avoidance of the regulatory program of the Interstate Commerce Act has been and currently is a serious and vexatious problem.

Backhaul buy-sell operations like appellees', together with sham buy-sell arrangements and the sham leasing involved in *Drum*, are the most prevalent means by which unauthorized operations have been carried on under the guise of private carriage. The continuing concern of the Commission with the practice involved in this case is reflected in its annual reports[6] and led it to recommend to Congress the

[5] The *Report on National Transportation Policy, Special Study Group on Transportation Policies in the United States* for the Senate Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. (the Doyle Report), p. 50, estimated that the percentage of motor carrier ton-mile traffic for 1958 handled by unregulated motor carriers was 68 percent.

[6] In its Sixty-Seventh Annual Report (1953), at p. 55, the Commission said:

"Merchandising by motortruck, whether actual or pretended, over long distances is increasing to such an extent that it is becoming a major factor in the transportation of freight between distant points. Manufacturers and mercantile establish-

legislation which became Section 203(c)[7] and its 1958 amendment.[8] Buy-and-sell operations of the type involved in this case, which the district court's decision sanctions, continue to be a serious enforcement problem for the Commission.[9]

CONCLUSION

This appeal presents a substantial question involving a matter of public importance in the administra-

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ments, which deliver in their own trucks articles which they manufacture or sell, are increasingly purchasing merchandise at or near their point of delivery and transporting such articles to their own terminal for sale to others. Such transportation is performed for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other cases, arrangements are made with the consignee of such merchandise for the 'buy-and-sell' arrangement in order that the consignee may receive transportation at a reduced cost." See also Sixty-Eighth Annual Report (1954), p. 5; Sixty-Ninth Annual Report (1955), p. 99; Seventieth Annual Report (1956), p. 161; Seventy-First Annual Report (1957), p. 137.

[7] Hearings on S. 1384, etc., Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., pp. 25–26.

[8] Hearings on Problems of the Railroads before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 1832 (1958); Hearings on Railroad Problems before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 109 (1958).

[9] Seventy-Sixth Annual Report (1962), p. 63. Since July 1, 1962, the Commission has begun nine investigation proceedings involving alleged buy-and-sell operations. During the three preceding years, the Commission ordered 16 buy-and-sell operations discontinued. Additionally, during the 12-month period ending December 31, 1962, the Commission successfully concluded eight criminal or civil enforcement cases arising from unauthorized buy-and-sell operations.

tion of the Interstate Commerce Act. Probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1963.

APPENDIX I

In the United States District Court for the Western District of Texas, San Antonio Division

Civil Action No. 2840

EMMA SHANNON AND RICHARD J. SHANNON
D/B/A E. & R. SHANNON

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Three-judge court: JOHN R. BROWN, United States Court of Appeals, Fifth Circuit; BEN H. RICE, JR., United States District Court, Western District of Texas; JOE M. INGRAHAM, United States District Court, Southern District of Texas.

RICE, *Judge:* This action is brought against the United States and the Interstate Commerce Commission, pursuant to the United States Code, Title 28, Sections 1336, 1398, 2284, and 2321–2325, to enjoin, annul, and set aside orders of the Interstate Commerce Commission issued in Docket No. MC–C–2055, *Emma Shannon and others, Investigation of Operations,* holding that plaintiff have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. 306(a) or 309(a), and requiring plaintiffs to cease and desist from conducting such unlawful transportation.

This Court has jurisdiction of this cause and there is no question as to venue.

Pursuant to the United States Code, Title 28, Section 2323, intervenors were given leave to intervene in this cause.

By an order dated November 5, 1956, Division 1 of the Interstate Commerce Commission instituted an investigation under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), into the activities of plaintiffs for the purpose of determining whether plaintiffs were engaged in transportation of property by motor vehicle as a common or contract carrier without requisite authority, in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. 306(a) or 309(a). The matter was referred to an examiner and a hearing was held on March 29, 1957, in San Antonio, Texas.

On August 29, 1957, the report and recommended order of the Examiner was served upon the parties, wherein the Examiner found that the motor carrier operations conducted by plaintiffs were not in violation of the Interstate Commerce Act, and recommended that the proceedings be discontinued. Exceptions were filed by the Commission's Bureau of Inquiry and Compliance.

On August 3, 1959, Division 1 of the Interstate Commerce Commission found that while the statement of facts in the Examiner's report was adequate in all material respects, that said Examiner was in error as to his conclusions with respect to the nature of the transportation conducted by plaintiffs and the lawfulness thereof. It thereupon refused to adopt the Examiner's recommended order, but instead found that the plaintiffs were engaged in the unauthorized transportation of sugar in violation of the Interstate Commerce Act, and ordered plaintiffs to cease

and desist from continuing such unlawful carriage. The Commission denies plaintiffs' petition for a rehearing and on April 5, 1960, ordered plaintiffs to cease and desist said unlawful carriage on or before May 23, 1960, and plaintiffs thereupon instituted this suit.

The basis facts in this proceeding are relatively uncomplicated. Plaintiffs are in the business of buying and selling livestock, in the feed mill business, and also buy and sell corn, oats, wheat, bran, molasses, sugar, salt, fertilizers, and everything in the feed line. Plaintiffs have been in business since about 1934, gradually increasing the number of items bought and sold with sugar being added as a saleable item about the year 1954. The large percentage of plaintiffs' assets are not composed of transportation facilities, nor do the salaries of truck drivers used to drive the trucks that from time to time haul sugar compose as much as twenty-five percent of plaintiffs' average weekly payroll. Plaintiffs purchase sugar in Louisiana in their own name, and haul same to San Antonio, Texas, in their own trucks, are fully responsible for same in the event of its damage or loss in value because of price fluctuations prior to the sale thereof, and maintain a reasonable inventory of sugar at their place of business in San Antonio. Plaintiffs sell sugar on credit and have sizeable amounts of accounts receivable owed by sugar purchasers. There is no evidence in the record showing that there are any identifiable transportation charges made by plaintiffs to the purchasers of sugar, nor have plaintiffs any basis or formula for assessing transportation charges. There is no evidence in the record showing that plaintiffs hold themselves out to the general public to haul sugar for any compensation, nor that it is plaintiffs' general practice to obtain orders for sugar from its

customers prior to purchasing same in Louisiana. The record clearly indicates that plaintiffs are in a general mercantile business buying and selling many items, including sugar.

There is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions, nor is there substantial evidence in the record to indicate that plaintiffs have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Commission arbitrarily exceeded its legal authority and defendants should be permanently enjoined from enforcing the terms of said order of April 5, 1960, which required and requires plaintiffs to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce found in the above described report of Division 1 of the Interstate Commerce Commission dated August 29, 1959, to be unlawful, until appropriate authority therefor is obtained. This Court will grant plaintiffs the relief they seek.

Opinion rendered this 24th day of April, 1963.

(S) JOHN R. BROWN,
United States Circuit Judge.
(S) JOE M. INGRAHAM,
United States District Judge.
(S) BEN H. RICE, JR.,
United States District Judge.

In the United States District Court for the Western District of Texas, San Antonio Division

Civil Action No. 2840

EMMA SHANNON AND RICHARD J. SHANNON d/b/a E. & R. SHANNON

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL.

On the 22nd day of September, 1961, in the above entitled and numbered cause came the plaintiffs, defendants, and intervenors, and submitted all matters in controversy to a statutory Three-Judge Court, consisting of Honorable John R. Brown, Judge of the United States Court of Appeals for the Fifth Circuit; Honorable Joe M. Ingraham, Judge of the United States District Court for the Southern District of Texas; and Honorable Ben H. Rice, Jr., Judge of the United States District Court for the Western District of Texas, and the Court after having considered the evidence in this cause and the written and oral argument of counsel, finds that plaintiffs are in a general mercantile business buying and selling many items, including sugar, and that there is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions that plaintiffs have been and are engaging in transportation in interstate commerce of sugar as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act and that said Interstate Commerce Commission in so finding and concluding arbitrarily exceeded its legal authority and that consequently the plaintiffs are entitled to the relief for which they pray, and it is, therefore,

ORDERED, ADJUDGED and DECREED by this Court that the Interstate Commerce Commission and the United States of America be and they are hereby permanently enjoined from enforcing the terms of the order of the Interstate Commerce Commission dated April 5, 1960, which required and requires plaintiffs, EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. & R. SHANNON, to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally from all operations in interstate or foreign commerce, found by Division 1 of the Interstate Commerce Commission by report dated August 29, 1959, to be unlawful.

It is further ordered that copies of this order be delivered by the Clerk of this Court to all parties, and that none of the costs herein be taxed against plaintiffs.

Signed and ordered entered this the 1st day of May, 1963.

(s) JOHN R. BROWN,
United States Circuit Judge.
(s) JOE M. INGRAHAM,
United States District Judge.
(s) BEN H. RICE, JR.,
United States District Judge.

APPENDIX II

Interstate Commerce Commission

No. MC–C–1994 [1]

Fraering Brokerage Company, Inc., Investigation of Operations

Decided August 3, 1959

1. Operations by respondent, in No. MC–C–1994, in the transportation of sugar from Matthews, La., to Harlingen, Tex., found to be those of a carrier for hire for which authority is required. Order entered requiring respondent to cease and desist from such unauthorized operations.

2. Operations by respondents Emma Shannon and Richard J. Shannon, in No. MC–C–2055, in the transportation of sugar from Supreme, La., to points in Texas found to be those of a carrier for hire for which authority is required. Order entered requiring respondents, jointly and severally, to cease and desist from such unauthorized operations.

3. Respondent J. T. Wilcox found not shown to have engaged in transportation as a broker of transportation in violation of section 211 of the act. Order entered discontinuing proceeding No. MC–C–2055 as to this respondent.

[1] This report also embraces No. MC–C–2055, Emma Shannon et al., Investigation of Operations.

Report of the Commission

Division 1, Commissioners Murphy, Goff, and Webb

By Division 1:

These proceedings were heard on separate records and were the subject of separate examiner reports and recommended orders. Since related issues are involved, they will be disposed of here in a single report.

Exceptions were filed by respondent in the title proceeding to the order recommended by the examiner, and the Bureau of Inquiry and Compliance of this Commission, hereinafter called the Bureau, replied. In the subtitled proceeding, the Bureau filed exceptions to the order recommended by the examiner, and respondents replied. Our conclusions differ somewhat from those recommended.

In No. MC–C–1994 by order entered June 21, 1956, division 1, instituted an investigation under section 204(c) of the Interstate Commerce Act, to determine whether Fraering Brokerage Company, Inc., hereinafter called Fraering, of New Orleans, La., has been or is engaging in the transportation of property, in interstate or foreign commerce, for compensation, as either a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209(a)(1) of the act. After hearing, the examiner found that Fraering's transportation of sugar from Matthews, La., to points in Florida, Mississippi, and Texas is that of a for-hire carrier by motor vehicle subject to part II of the act, and recommended that it be ordered to cease and desist from such operations.

On exceptions Fraering contends that the examiner erred (1) in finding that it was interested solely in the revenue earned by its trucks transporting sugar in

order to obtain a return movement of canned goods, (2) in finding that its principal consideration in transporting sugar sold is the revenue received from the transportation thereof, and (3) in finding that transportation of sugar by it did not appear to be in furtherance of its selling operations. It asserts that under the "primary-business" test, hereinafter described, its transportation of sugar should be found to be incidental to and part of its brokerage operations and therefore private carriage. In reply [the] Bureau contends (1) that such transportation is not incidental to or in furtherance of Fraering's nontransportation business, (2) that, conceding that Fraering has a bona fide business as a broker of sugar, the existence of such a business does not of itself preclude a finding that the transportation of the concerned sugar is for-hire transportation, and (3) that its principal consideration in transporting the sugar is compensation earned by such transportation.

In No. MC–C–2055, division 1 instituted an investigation, by order dated November 5, 1956, under section 204(c) of the act, for the purpose of determining (1) whether Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, of San Antonio, Tex., hereinafter called the Shannons, have been and are engaged in the transportation of property as a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209(a)(1) of the act, and (2) whether J. T. Wilcox has been and is engaged in transactions as a broker in violation of section 211 of the act.

After hearing, the examiner found that the Shannons are engaged in the business of buying and selling livestock, livestock feedstuffs, molasses, grain, salt, and sugar; that the transportation in their own

vehicles of the sugar to which they hold title is in the furtherance of their primary noncarrier commercial enterprise; that under the "primary business" doctrine such transportation constitutes private carriage; and that the investigation should be discontinued. No evidence was presented at the hearing tending to show any unauthorized brokerage operations by respondent J. T. Wilcox, and the proceeding as to this respondent will be discontinued.

On exceptions the Bureau maintains (1) that the examiner erred in finding that the Shannons' transportation of sugar is in furtherance of a primary commercial enterprise other than transportation and hence private carriage, (2) that they transport sugar, not as a private carrier, but with the purpose of profiting from the transportation in the same manner as any for-hire carrier does, (3) that the purchase and sale of sugar is merely a device to procure a payload for vehicles which would otherwise return empty, (4) that the small storage of sugar at San Antonio, the direct deliveries to ultimate users, and the small profit (less than prevailing transportation costs) netted by respondents are all indicia of for-hire carriage, (5) that the close proximity of the dates of purchase to the dates of delivery to such users strongly indicates purchases by respondents to fill orders previously secured despite contrary claims, and (6) that taken together the foregoing facts require a finding that the Shannons are engaged in the interstate transportation of sugar as either a common or contract carrier by motor vehicle without appropriate authority from this Commission. In reply the Shannons assert that their primary business is that of buying and selling livestock, grain feed, sugar, and other commodities; that their transportation of sugar is in furtherance of their noncarrier commercial activities and a necessary in-

cident thereto; and that the findings of the examiner should be adopted.

The recommendations of the examiners, the exceptions, and the replies thereto have been considered in the light of the evidence. We find the statements of facts in the examiners' reports to be adequate in all material respects, and, as modified here, we adopt them as our own. Certain facts will be repeated herein for clarity of discussion.

No. MC–C–1994.—Fraering, operating a warehouse at New Orleans, engages in wholesale selling of canned foods, dried fruits, nonfood items, and certain specialty items, hereinafter collectively called groceries. In addition to wholesaling its own groceries, it sells some other grocery items as a broker, and acts as a broker of refined sugar produced by the South Coast Corporation of New Orleans, hereinafter called South Coast. Fraering's transportation of its own groceries admittedly is conducted as part or as an incident of its primary business, the sale and brokerage of certain products and, as such, its operations relating to these commodities are those of a private carrier. Fraering transports only a relatively small portion of brokered groceries compared to its own commodities and, to a great extent, only as an accommodation to those with whom it deals. Since the charge per case for this transportation of brokered groceries does not vary with distance traveled, only some of this transportation is profitable. The transportation of brokered groceries does not appreciably affect Fraering's cost of operation. This described transportation of brokered goods other than sugar is private carriage in bona fide furtherance of Fraering's wholesale and brokerage business. The transportation by Fraering in its own vehicles of its own groceries and of the grocery items it brokers is not challenged. It is

Fraering's activities with respect to the transportation of sugar which concern us here.

Within a defined area of the South and Southwest, Fraering is the exclusive selling agent for sugar produced by South Coast at Matthews, La., some 40 or 50 miles from New Orleans. Of the 8 million pounds of sugar sold by Fraering for South Coast, between September 1955 and January 1956, all but 810,000 pounds moved by for-hire carriers from Matthews directly to the various consignees. The remaining 810,000 pounds were handled by Fraering in its own tractor-trailer units of which it has four. These four units of equipment also were utilized to move groceries. Fraering's representative indicates (1) that Fraering only transports a load of sugar when it can be moved in conjunction with a grocery movement in the opposite direction; (2) that it has more groceries moving toward New Orleans from points in the Rio Grande Valley of Texas than sugar shipments in the other direction, and only utilizes rail carriers for the sugar movements when it is impossible to correlate an inbound grocery shipment with an outbound sugar shipment; (3) that, generally, the charge made for sugar transportation would little more than cover the cost of operation, and in some instances the charge for the transportation plus brokerage fees does not entirely cover the cost of operation of the trucks while loaded with a particular sugar shipment; (4) that, even though there are other benefits in using private carriage rather than for-hire carriage, the principal incentive for Fraering's transportation of sugar is that the sugar constitutes return lading for trucks moving its groceries in the opposite direction; and (5) that the revenue received is adequate to assure overall profitable operations inasmuch as the cost of transportation on the commodities moving in

the opposite direction is sharply reduced by the sugar backhaul.

Fraering takes possession of the sugar at Matthews and assumes responsibility for it while it is in transit but does not take title to it. South Coast is paid by the consignee for the sugar f.o.b. Matthews, and any transportation charge for carriage performed by Fraering, whether collected directly by it or collected by South Coast, belongs to Fraering. In the sale of sugar as a broker, Fraering enters into contracts with buyers on contract forms of South Coast or sells sugar on spot quotations from the refinery. It receives a brokerage fee which is unrelated to whether the sugar moves by for-hire carriage or by private carriage.

One of the principal purchasers of sugar produced by South Coast is located at Harlingen, in the Rio Grande Valley of Texas. Most of the sugar sold by Fraering to this buyer is transported by Fraering from the refinery to Harlingen. Fraering regularly purchases substantial quantities of groceries from a source of supply at Donna, Tex., about 23 miles west of Harlingen, and sometimes moves such commodities to New Orleans in conjunction with sugar hauls to Harlingen. On the movement of sugar from Matthews to Harlingen, Fraering collects 53.59 cents per 100 pounds over and above the cost of the sugar at point of origin; this compares with transportation charges of 73 cents per 100 pounds by rail in carloads and $1.10 per 100 pounds, in truckload quantities by use of regulated for-hire motor carriers. There is some indication of record that Fraering provides the over-the-road transportation from the refinery to other sugar customers including military installations at points other than Harlingen, but its method of operation with respect to such customers and the

relationship of such operations to its primary business is not sufficiently developed in this record to further merit our consideration.

No. MC–C–2055.—The facts pertaining to the business activities and transportation engaged in by the Shannons are as follows: E. and R. Shannon, with headquarters and a warehouse at San Antonio, have been engaged as a partnership in the business of buying and selling livestock since 1934, and in connection therewith have transported livestock as a bona fide private carrier. In or about 1951 their activities were expanded to include the purchase and resale of grain, fertilizer, molasses, and salt, and in 1954, of sugar. They operate seven trucks which are used in connection with some deliveries to customers of the commodities in which they deal. On shipments of livestock and some other commodities (not including sugar) they use common carriers to some extent but have never used for-hire carriage for the transportation of sugar. No one questions but that the primary business of the Shannons is that of a dealer in livestock and related items above named except sugar, and that the transportation by them of all of the named commodities, except sugar, is primarily in furtherance of their main or principal business. In dealings which correspond with movements of livestock transported to destinations in southern Louisiana, the Shannons have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, La., and transporting and selling it to purchasers, the majority of whom are located in San Antonio. The distance from Supreme to San Antonio is 525 miles. All purchases from the refinery are made on credit, subject to a 2-percent discount if payment is made within 10 days, and the sales by the Shannons at San Antonio are made on the same terms.

An investigation by the Commission's district supervisor indicates that the sugar transported by the Shannons is customarily loaded at the refinery, moved directly to and unloaded at the place of business of the purchaser, although sometimes loads are delivered to the Shannons' warehouse at San Antonio and subsequently sold to users in small lots of from 1 to 25 bags. At the hearing the dominant partner maintained that the sugar transported is never sold until after it has left Supreme and is en route to San Antonio; but there are some contrary indications of record, and it is clear that whenever sugar transportation is not coordinated with an appropriate backhaul, it is transported to fill an order obtained in advance. On one occasion the Shannons were forced to use a public warehouse for a truckload of sugar because of space limitations of their own warehouse and, generally, the record supports a finding that sugar sales usually are made by the Shannons after it is en route or has arrived at their warehouse.

Based on the going market price, a bona fide dealer at San Antonio will normally realize a profit of from 25 to 35 cents per hundred pounds on sugar. The Bureau submitted an exhibit covering 15 truckloads of sugar transported by the Shannons from Supreme to San Antonio during the period from May to August 1956, on which the net profit to them, based upon the difference between the price paid at Supreme and that received at San Antonio, including transportation, ranged from 27 to 47 cents a hundred pounds, and averaged 35.74 cents per hundred pounds. The Bureau argues that the profits realized by the Shannons from their sugar sales and those realized by bona fide sugar dealers at San Antonio are not directly comparable because the former are computed without regard to transportation costs whereas the

latter necessarily allow for such costs. Compared to the Shannons' average profit of 35.74 cents per hundred including transportation, the record indicates that the applicable rail carload and motor truckload rates on sugar moving from and to the same point is 69 and 109 cents per hundred pounds, respectively. The 15 truckloads listed by the Bureau were resold in San Antonio within from 1 to 2 days after their pickup at Supreme. The Shannons' explanation of the rapid turnover is that sugar is highly perishable, being particularly susceptible to damage by dampness; that it is subject to sudden and drastic price fluctuations; and that consequently all dealers make a practice of selling it as quickly as possible in order to forestall any loss. They frankly admit, however, that the principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul they have to have traffic moving from San Antonio to Louisiana.

DISCUSSIONS AND CONCLUSIONS

In *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65, 75, hereinafter called the *Lenoir* case, it was said that, if the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. This decision was affirmed by the Supreme Court of the United States in *Brooks Transp. Co., Inc., v. United States*, 340 U.S. 925.

Subsequent to the taking of evidence in the instant proceedings, section 203(c) of the act was amended (in August 1958) to read:

> Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Amendment of this section had the effect, among other things, of writing into the act our usual or "primary business" test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is required. From the portion of the legislative committee reports relating to the amendment of section 203(c) set forth in appendixes A and B hereto it is clear that insofar as the test expressed in the *Lenoir* case is concerned, the amended section is not intended to change, but to codify, the law with respect to the test for the determining of what transportation activities are permitted within the scope of lawful private carriage. It is our

view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as neither Fraering nor the Shannons are engaged in transportation as a primary business, is whether the sugar transportation operations of Fraering or of the Shannons are in bona fide furtherance of the primary business of the respective respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed.

In each of the proceedings before us, the respondents are primarily engaged in certain noncarrier commercial enterprises. The respondents concededly are performing some transportation as private carriage within the scope, and in furtherance, of their respective primary business enterprises. In order to determine the status of their sugar transportation activities, we must consider both their primary business and the particular facts relating to each of the transportation operations performed.

Fraering is primarily a wholesaler and broker of certain grocery items but contends that its primary business includes the brokerage of sugar. Its transportation activities include the carriage of such commodities as canned foods, dried fruits, nonfood items, and certain specialty items. They also include the carriage of sugar. We are concerned here with how its sugar brokerage differs, if at all, from its wholesale and other brokerage business enterprise and how its sugar transportation activities differ, if at all, from its transportation activities which are concededly in furtherance of its primary business. The Shannons are engaged in buying and selling livestock and certain related items including, according to their contention, sugar. Similarly, we are concerned here

with how their sugar dealings differ, if at all, from their dealings in the other commodities and how their sugar transportation activities differ, if at all, from their transportation activities which are admittedly in furtherance of their primary business.

Fraering wholesales certain commodities for profit and, in fact, derives from its wholesaling enterprises most of its business profit. Its brokerage of certain grocery items does not change its basic wholesaling operation but, rather, adds to its line of few complementary items which are handled in a manner similar to those it sells as a wholesaler and does not change its profit sources or expectations. The handling of these items as a wholesaler or broker is its primary business from which its expects, without relying on profit which is expected to accrue from transportation activities, to make a profit. Its dealings in sugar, which it sells as a broker but does not transport and on which it merely profits as a broker, appears to be an enterprise similar to, or even a part of, its primary business. However, its dealings in some sugar, as in the situation where it buys at Matthews and sells at Harlingen, wherein the principal reason, clearly expressed in the record in the title proceeding, for such dealings is the generation of sugar shipments which it can transport as return lading for its trucks which are moving in the opposite direction, cannot be considered to be a part or within the scope of its primary business. That its activities with respect to this described sugar which it transports have a purpose different from the purposes of its primary business can be more clearly seen when it is considered that such sugar transportation is not believed by it to be undesirable or without profit even when the transportation charge plus brokerage fees do not entirely cover the cost of operation of the truck transporting the particular sugar shipment. It is

clear that the purpose of its engaging in the brokerage of such sugar and the transportation thereof from Matthews to Harlingen is to reduce the cost of transporting groceries (owned by it) from Donna to New Orleans. The "reduction of the cost of transportation" of the other commodities from Donna to New Orleans constitutes a profit from the transportation of sugar from Matthews to Harlingen, and we are satisfied that its operations with respect to the sugar which it transports from Matthews to Harlingen are undertaken "for the purpose of profiting from the transportation as such." In the *Lenoir* case we said that a finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that motor operations are conducted in bona fide furtherance of its other and primary enterprise. We have that situation here. Inasmuch as Fraering's transportation of sugar from Matthews to Harlingen makes its grocery transportation in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which the grocery transportation is performed. It can, however, at most, be considered to be in furtherance of certain lawful private transportation operations of Fraering, and only secondarily related to the primary business of Fraering, which is again, a noncarrier, commercial enterprise. It is our opinion that, while its transportation of commodities other than sugar are in furtherance of its primary business, its transportation of the sugar, which it transports from Matthews to Harlingen, with respect to its primary business, is a related or secondary enterprise conducted with the purpose of profiting from the transportation performed and, as such, constitutes for-hire carriage for

which operating authority from this Commission is required; and we so find.

The Shannons have long been buying and selling certain commodities and in connection therewith transporting them to purchasers, in bona fide furtherance of their primary business, as a dealer in those commodities. The Bureau concedes that the transportation of livestock and certain related items is within the scope of lawful private carriage, but argues, in essence, that the here considered sugar transportation operation is undertaken to make profitable their lawful private-carrier activities in the opposite direction; is no more than a related or secondary enterprise, with respect to their primary business, inasmuch as it is conducted with the purposes of profiting from the transportation as such; and, as a consequence, is for-hire transportation subject to the licensing provisions of the act. There can be no question but that the considered sugar transportation and the transportation admittedly within the scope of their lawful private carrier activities tend to support one another and that part of the profit of each is the reduction of the cost of the other. It also seems clear that, in many instances, for example at the time of the hearing, dealership in the sugar by the Shannons would not be conducted at a profit without the benefit of backhaul traffic. In fact, the Shannons admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio. Although there are vague representations of record that the Shannons have transported sugar from Supreme to some points in Texas on occasions when the

shipments were not coordinated with backhauls of livestock or feeds, the dominant partner, in discussing such movements describes such a situation as one wherein they had an order, made a special trip to Supreme, and got "more" money for hauling the particular load of sugar handled under the arrangement. This situation in itself constitutes for-hire carriage within the doctrine of *Jay Cee Transport Co. Contract Carrier Application,* 68 M.C.C. 758, which holds, in part, that in a situation where a person actually does nothing but transport commodities from its suppliers to the users thereof, the fact that the person takes title to the goods is not sufficient to establish the person's status as a private carrier. The more usual arrangement under which they operate, however, appears to be one in which the Shannons have no preexisting sugar order, but buy with the intention of selling later either en route or after the transportation is accomplished. This procedure is ordinarily coordinated with a backhaul, and the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction. We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such reduction of the cost of transportation of the other commodities constitutes a profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it is

an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

We find in No. MC–C–1994 that Fraering Brokerage Company, Inc., has been and is engaging in transportation, in interstate commerce, of sugar from Matthews, La., to Harlingen, Tex., for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring it to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.

We find in No. MC–C–2055 that Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, have been and are engaging in transportation, in interstate commerce, of sugar from Supreme, [La.], to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring them to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.

And, we further find in No. MC–C–2055 that J. T. Wilcox has not been shown to have engaged in any transactions as a broker of transportation in violation of section 211 of the act and that the proceeding should be discontinued as to respondent J. T. Wilcox.

Orders will be entered (1) requiring Fraering Brokerage Company, Inc., and Emma Shannon and Richard J. Shannon, in the respective proceedings, to cease and desist forthwith, and hereafter to abstain, from participation in any operation, in interstate or foreign commerce, of the character found in this report to be unlawful, unless and until there is in force and effect, with respect to such carriage, appropriate authority therefor, and, (2) in the subtitle proceeding, discontinuing the proceeding as to respondent J. T. Wilcox.

COMMISSIONER WEBB, dissenting in part:

I am unable to concur in the finding in No. MC–C–1994 that the respondent, Fraering, is engaged in for-hire transportation of sugar. Fraering is a bona fide broker of sugar, and this report concedes that its sugar business appears to be a part of its primary business. In the circumstances, it is my opinion that the evidence warrants the conclusion that its transportation of sugar is in furtherance of its primary (nontransportation) business and is a true private carriage operation.

I agree with the findings in No. MC–C–2055. The evidence warrants the conclusion that respondents-Shannons, unlike Fraering, are not bona fide dealers in sugar despite their maintenance of a rather small sugar inventory at their San Antonio storage facility. They are properly found to be unlawfully engaged in for-hire transportation.

APPENDIX A

Portion of Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce on S. 3778 relating to amendment of section 203(c) of the act

7. ECONOMIC REGULATION OF COMMERCIAL TRANSPORTATION

A matter of serious concern to the subcommittee is the growing practice of persons engaging in the commercial transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

The enormous growth of commercial private carriage of property by motor vehicle in recent years, resulting as it has in a continuing erosion of huge volumes of traffic that would otherwise be available for transportation by public carriers, is a serious problem for the railroads and other common carriers. To the extent that this growth has occurred in bona fide private carriage, i.e., the transportation of one's own materials, supplies, and products in one's own vehicles within the scope and in furtherance of one's primary business enterprise (other than transportation), there is no room for complaint; but there is just cause for complaint as to motor carriage which although performed under the guise of private transportation is actually public

transportation. Not only do the purveyors of the transportation service evade economic regulations; but in many instances payment of the Federal transportation excise taxes is also avoided, for the tax on amounts paid for the transportation of property is not levied on proprietary transportation.

Various subterfuges are employed to evade economic regulation and avoid imposition of the transportation excise taxes. The one most commonly used is the so-called by-and-sell method of operation involving the issuance of bills of sale, invoices, and other such instruments to make it appear that the commodities being transported are those of the vehicle owner when in fact the transaction is merely a device to provide transportation for hire without a certificate or permit and without payment of the transportation tax. Another is the backhaul method of operation increasingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.

There are numerous variations but, whatever the precise nature of the subterfuge employed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its transportation requirements. Protection is needed from destructive competition of this kind.

The Interstate Commerce Commission has said that this is one of the problems of most serious concern to it in administration of the Interstate Commerce Act, that where so-called

private carriage is a subterfuge for engaging in public transportation it constitutes a growing menace to shippers and carriers alike, being injurious to sound public transportation, promoting discrimination between shippers, and threatening existing rate structures. It was to curb just such practices that part II of the Interstate Commerce Act was enacted.

In the first session of the present Congress (Public Law 85–163, approved August 22, 1957) the Interstate Commerce Act was amended to prohibit one (except as otherwise specifically provided) from engaging in any "for-hire transportation business by motor vehicle" in interstate or foreign commerce without a certificate or a permit authorizing such transportation. This prohibition is expected to prove helpful in correcting certain of the abuses described, but it appears that loopholes may still remain. What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a primary business enterprise (other than transportation) of such person.

With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (*a*) duly certificated common carriage, (*b*) duly permitted contract carriage, or (*c*) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided would be prohib-

ited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the "primary business test" contained in Brooks Transportation Co. v. U.S. (340 U.S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

APPENDIX B

Portion of House Report No. 1922 of the Committee on Interstate and Foreign Commerce on R. 12832 relating to amendment of section 203(c) of the act

PSEUDO-PRIVATE CARRIAGE

(Sec. 7, amending sec. 203(c) of the act)

The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of "pseudo-private carriage" by truck. One of the subterfuges most commonly used in this type of carriage is the "buy-and-sell" arrangement, whereby fictitious bills of sale and invoices are used to make it appear that the commodities being transported by truck are those of the vehicle owner and operator and that the transportation involved is private carriage. The real business of persons engaged in this type of operation is, in fact, transportation, and the movement of goods performed by them is not in furtherance of any primary, or bona fide business enterprise other than transportation.

In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and

transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

This pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act. It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier.

The Interstate Commerce Commission has found it most difficult to cope effectively with this problem under the present provisions of the Interstate Commerce Act. The Commission has urged the Congress for several years to make legislative changes in the act to eliminate these practices, and it drafted a bill to accomplish this objective, which was introduced as H.R. 5825, 85th Congress. That bill proposed to amend the definition of "private carrier" in section 203(a)(17) of the act by adding a proviso thereto to the effect that any person who purchases, transports, and sells property for the purpose of fostering a highway transportation business is engaging in a public transportation service and shall be subject to economic regulation by the Commission.

During the committee's hearings on H.R.

5825, many witnesses expressed the fear that if the definition of a private carrier of property by motor vehicle was changed, it would open the door to reconsideration of the concept of the "primary business" test of private carriage as enunciated by the Commission in the Lenoir Chair case(51 M.C.C. 65 (1949)) and by the United States Supreme Court in the Brooks case (Brooks Transportation Co. v. United States, 340 U.S. 925 (1951)).

In the Brooks case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under that doctrine, if transportation is performed in furtherance of the primary business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for-hire.

This doctrine has been helpful to the bona fide private carriers. They are fearful that any amendment of the definition of "private carrier of property by motor vehicle" may result in an unsettling of the "primary business" test and require them to embark upon another long series of litigation similar to that which culminated in the Brooks decision.

In the first session of the 85th Congress the Interstate Commerce Act was amended (by Public Law 85–163) by the addition of section 203(c) which prohibits a person, except as otherwise specifically provided in the act, from engaging in any for-hire transportation business by motor vehicle in interstate or foreign commerce without a certificate or permit to authorize such transportation. This prohibition is expected to prove helpful in correcting certain abuses, but it appears that the abuses resulting from pseudo-private carriage are not adequately dealt with by section 203(c).

Under these circumstances several witnesses recommended, and this committee favors, the further amendment to section 203(c) of the act contained in section 7 of the reported bill. This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and in furtherance of, a primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case.

ORDER

At a session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D.C., on the 3rd day of August, A.D. 1959.

No. MC–C–1994

FRAERING BROKERAGE COMPANY, INC., INVESTIGATION OF OPERATIONS

No. MC–C–2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS

These proceedings having been duly instituted, and full investigation of the matters and things involved having been made, and the said division having, on the date hereof, made and filed a report herein containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof;

It is ordered, That the respondent in No. MC–C–1994, be, and it is hereby, notified and required to

cease and desist forthwith, and thereafter to refrain and abstain, from all operations in interstate or foreign commerce of the character found in said division report to be unlawful, unless and until appropriate authority therefor is obtained.

It is further ordered, That respondents Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, in No. MC–C–2055, be, and they are hereby, notified and required to cease and desist forthwith, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report to be unlawful, unless and until appropriate authority therefor is obtained.

It is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as September 18, 1959.

And it is further ordered, That proceeding No. MC–C–2055, as to J. T. Wilcox be, and it is hereby, discontinued.

By the Commission, division 1.

[SEAL] HAROLD D. McCOY,
Secretary.

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 5th day of April, A.D. 1960.

No. MC–C–1994

FRAERING BROKERAGE COMPANY, INC., INVESTIGATION OF OPERATIONS

(New Orleans, La.)

No. MC–C–2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS

(San Antonio, Tex.)

Upon consideration of the records in the above-entitled proceeding, and of:

(1) Petition of Fraering Brokerage Co., Inc., respondent in No. MC–C–1994, filed September 30, 1959, for reconsideration;

(2) Joint petition of Emma Shannon and Richard J. Shannon, respondents in No. MC–C–2055, filed September 8, 1959, for reconsideration;

(3) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed October 16, 1959, to the petition in (1) above;

(4) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed September 25, 1959, to the petition in (2) above;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law;

It is ordered, That the order of August 3, 1959, as indefinitely postponed with respect to statutory effective and compliance date, be and it is hereby, reinstated, and the statutory effective and compliance date is hereby fixed as May 23, 1960.

By the Commission.

[SEAL]

HAROLD D. McCOY,
Secretary.

APPENDIX III

Section 203(a)(14) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(14), provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(15), provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 203(a)(17) of the Interstate Commerce Act 49 U.S.C. § 303(a)(17), provides:

> The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Section 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c) provides:

> Sec. 203(c) * * * no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Section 206(a) of the Interstate Commerce Act, 49 U.S.C. § 306(a) in part provides:

> * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

Section 209(a) of the Interstate Commerce Act, 49 U.S.C. § 309(a) provides in part:

> * * * no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business: * * *.

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